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No. 568

In the Supreme Court of the United States

OCTOBER TERM, 1931

THE UNITED STATES OF AMERICA, APPELLANT

v.

SWIFT & COMPANY ET AL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the Supreme Court of the District of Columbia (R. 1039) is unreported.

JURISDICTION

The order of the lower court modifying the decree of February 27, 1920, was entered January 31, 1931. (R. 1060.) Petition for appeal was filed March 30, 1931, and was allowed on the same day. (R. 1125, 1126.)

Jurisdiction of this Court is conferred by Section 2 of the Act of February 11, 1903, c. 544, 32 Stat.

823 (U. S. C., Title 15, Sec. 29), and by Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C., Title 28, Sec. 345.) *Swift & Co.* v. *United States*, 276 U. S. 311.

QUESTIONS PRESENTED

The fundamental question presented is whether there have been changes since 1920 which warrant modifying the provisions of the 1920 consent decree which enjoined the defendant packers from dealing in certain commodities not related to the meat industry and from using their distributive facilites for handling these commodities. Other questions presented, preliminary to this question, are (1) the purpose and object of the decree in imposing these restraints and (2) the character of the changes which would warrant removing these restraints.

The intervener wholesale grocers' associations have also raised the question of the power of the court below to modify the decree without the consent of the Government. The Government has conceded that the power of the court to modify the consent decree is the same as its power to modify a decree entered after litigation.

STATUTE INVOLVED

The Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. C., Title 15, Secs. 1, 2, and 4), known as the Sherman Antitrust Act, provides in part as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy,

in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

* * * * *

SEC. 4. The several circuit courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be

enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.

STATEMENT

This is a direct appeal from an order entered by the lower court modifying in certain respects a consent decree entered in that court on February 27, 1920. (R. 153, 1060.) After the essential validity of the consent decree had been sustained (*Swift & Company* v. *United States*, 276 U. S. 311; *United States* v. *California Cooperative Canneries*, 279 U. S. 553), appellees filed their petitions to modify the decree upon the ground of alleged changes in economic and other conditions. The Government contends that neither the lower court's findings nor the evidence support the order modifying the decree and that its effect is to attack collaterally a decree which is immune from direct attack.

The Government's original bill, brought under Section 4 of the Sherman Antitrust Act and Section 15 of the Clayton Act, named as defendants the five leading meat packing companies[1]—Swift &

[1] These five defendants, now reduced by merger to four, will be hereinafter sometimes refered to as "defendants."

Company, Armour & Company, Morris & Company, Wilson & Company, and Cudahy Packing Company—and numerous subsidiary corporations and individuals, the latter chiefly officers of the principal defendants. (R. 1–7.) The bill alleged that the defendants, whose business originally was the purchase and slaughter of livestock and the preparation and sale of its products, had not only extended these operations until they were nation-wide but had also added large dealings in foods other than meats and in many other commodities; that by various methods set out in the bill they had built up an unlawful monopoly and control of a great portion of the food supply of the nation; and that they were attempting to extend this monopoly. (R. 8–20.) It alleged that the defendants were aided in their combination by their great size; by their control of stockyard companies, stockyard terminal railroads, and stockyard newspapers, which, in turn, enabled them to control the assignment of livestock pens and office space to commission men and dealers on the yards, the leasing of land at the yards for independent packing plants, the furnishing of transportation facilities to the yards, and the dissemination of market information to shippers of livestock, and thereby influence to their own advantage the flow of livestock to market; by unlawful agreements, particularly so-called percentage purchase agreements, for the purchase by each of standing percentages of livestock at the various

markets; and by their ownership and operation of private refrigerator cars, route cars, branch houses, and storage warehouses, which, it was alleged, gave to the defendants peculiar advantages over their competitiors in the handling of commodities unrelated to meats. (R. 8–20.) The bill prayed for an injunction and for the divestiture of certain of the instrumentalities employed in the attempt to monopolize. (R. 21–22.)

Simultaneously with the filing of the bill, answers and a stipulation signed by all the parties were filed. (R. 23, 49, 76, 108, 127, 139, 145, 150.) The stipulation provided for the entry of a decree, without any findings of fact, upon the terms therein set forth, and provided that the decree "shall not constitute or be considered as an adjudication that the defendants, or any of them, have in fact violated any law of the United States." (R. 150.) The decree, also entered on the same date, not merely enjoined continuance of the attempt to monopolize and the use of illegal practices but deprived the defendants of the means whereby the attempt was being accomplished. (R. 153–167.) The defendants were enjoined from (1) holding any interest in public stockyard companies, stockyard terminal railroads, or market newspapers; (2) engaging in, or holding any interest in, the business of manufacturing, selling, or transporting (except as common carriers) any of 114 enumerated food products (principally fish, vegetables, fruits, and grocery items) and 30 other articles deemed unre-

lated to the meat packing industry (both the substitute food items and other commodities being hereinafter sometimes referred to as "unrelated lines"); (3) using their distributive facilities or permitting others to use them for the handling of any of these enumerated articles; (4) selling meat at retail; (5) holding any interest in any public cold-storage plant; and (6) selling fresh milk or cream. (R. 153–167.)

Appellees' petitions for modification,[2] with which this proceeding originated, in effect asked that each of the specific prohibitions of the decree be removed, leaving only the general injunction against conspiracy. (R. 200, 255.) While appellees purported to seek merely modifications, in substance they sought to have the decree nullified. They requested permission (1) to own and operate retail food stores; (2) to own interests in public stockyards and stockyard terminal railroads; (3) to manufacture and deal in unrelated lines; (4) to use, or permit others to use, their distributive facilities for all purposes; and (5) Swift & Company, in addition, asked that the defendants be permitted to hold interests in public cold-storage warehouses and to sell fresh milk and cream. (R. 244, 309–310.)

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[2] Separate petitions for modification were filed by Swift & Company and its officers and subsidiary corporations, defendants in the original proceeding, and by Armour & Company and its officers and subsidiary corporations, defendants in the original proceeding.

The Southern Wholesale Grocers' Association[1] and others (appellants in No. 569) and the National Wholesale Grocers Association (appellant in No. 570), who had been permitted to intervene in 1921 for the purpose of being heard in opposition to any modification of the decree, filed motions to dismiss the petitions. (R. 174, 188, 310, 313, 315, 316.) After the court had overruled these motions, the United States filed answers calling for proof of the allegations of the petitions, and answers were filed by the foregoing interveners. (R. 319, 321, 322 334, 346, 368.) The lower court, after a hearing, entered an order modifying the original decree so as to permit the defendants to manufacture and deal in unrelated lines, except at retail, and to use or to permit others to use their distributive facilities for this purpose. (R. 1060.)

A proper appreciation of the issues which are here presented requires some review of the history of the case. The consent decree entered in 1920 climaxed two decades of litigation involving alleged violations of the antitrust laws by the defendants. See *Stafford* v. *Wallace*, 258 U. S. 495, 499–500. In 1903 the Government filed a bill in equity charging a conspiracy to control the purchase of livestock and the sale and distribution of meat products. A demurrer filed by the packers was overruled and an injunction issued, which this Court sustained. *United States* v. *Swift & Company*, 122 Fed. 529;

[1] The name of this association was later changed to American Wholesale Grocers' Association. (R. 191.)

Swift & Company v. *United States*, 196 U. S. 375. There followed in 1905 a criminal indictment. The defendants did not answer on the merits, but attacked the grand jury procedure and filed a demurrer. These were overruled, but claims of immunity based upon previous testimony before a public official were sustained as to the individual defendants, and the indictments were then dismissed as against the corporations. A further indictment was returned against the Swift, Armour, and Morris groups of defendants in 1910 when they joined in organizing the National Packing Company. After claims of immunity and demurrers had been overruled (*United States* v. *Swift & Company*, 186 Fed. 1002; *United States* v. *Swift*, 188 Fed. 92), the defendants were acquitted, but threat of a civil suit resulted in dissolution of the National Packing Company and distribution of its assets among the three packers. (Cong. Rec., Vol. 61, pt. 2, p. 1865.) In 1917 the President directed the Federal Trade Commission to investigate the meat-packing industry and the Government's original bill in this case followed the facts disclosed and the charges made in the Commission's voluminous report of its investigation.

There seems little doubt that all parties to the consent decree, both the Government and the five principal packers, intended thereby finally to determine the rights of the respective parties under the antitrust laws of the United States. The conclusion that the consent decree was a final adjudica-

tion intended to bring the packers within the law must have been reinforced when in 1921 Congress, to supplement the provisions of the decree and to strengthen its effect, passed the Packers and Stockyards Act (42 Stat. 159) placing large stockyards under public supervision and transferring to the Secretary of Agriculture jurisdiction over packers in respect of acts and practices violative of the antitrust laws. That Congress did not make the provisions of this Act even more stringent may have been due to the prohibitions of the consent decree. (Cong. Rec., Vol. 61, pt. 2, pp. 1860–1862; R. 1056.)

There is some indication that almost from the time the decree was entered appellees intended to attack it. As previously stated, the two appellant associations of wholesale grocers were in 1921 permitted to intervene to oppose any change in the consent decree. (*Supra*, p. 8.) In 1922 the California Cooperative Canneries Corporation sought to intervene to have the decree vacated upon the ground that the decree interfered with its contractual relations with Armour & Company. While litigation growing out of this petition of intervention was pending, the Swift and Armour groups of defendants in 1924 filed motions to vacate the decree. This Court sustained the order of the Supreme Court of the District of Columbia overruling these motions and upheld in every respect the validity of the consent decree. *Swift & Co.* v. *United States*, 276 U. S. 311, *supra*.

Whether appellees' purpose was justified or not, the fact remains that over a period of almost twelve years they have avoided full and complete compliance with the decree entered by consent in 1920. The effect of the attempted intervention [4] of the California Canneries and of the decision thereon by the Court of Appeals of the District of Columbia, which this Court held erroneous (*United States* v. *California Cooperative Canneries*, 279 U. S. 553, *supra*), was to suspend the operation of the decree from May 1, 1925, to July 24, 1929, the date when the lower court entered a decree upon the mandate of this Court in the *Canneries* case. (R. 194, 195.) Upon the day this decree was entered the Swift and Armour groups of defendants filed petitions to extend the time for compliance. (R. 196, 198.) The court set October 2, 1929, for a hearing thereon and extended the time for compliance until that date. (R. 196.) Appellees' original petitions for modification of the decree were filed prior to October 2, 1929, and hearing on the requested extensions was postponed to the hearing on these

[4] The record in the present case discloses the close financial relationship existing between California Canneries and Armour & Company. At the time of the trial below the California Canneries owed Armour between $1,400,000 and $1,500,000, and the California Canneries had had to borrow from Armour funds necessary for working capital. (R. 715.) In addition, Armour had guaranteed accounts on which the California Canneries then owed $350,000. (R. 715.)

petitions. (R. 1041.) In the final order entered herein on January 31, 1931, the defendants were given an extension of one year from the date thereof "to complete their disposition, in accordance with the terms of said consent decree, of any properties or interests now held contrary to the provisions of said decree." (R. 1062.) Armour's sales at wholesale of unrelated lines, which the decree prohibited, have varied considerably, but in no year since 1920 have they been less than $2,300,000 and during the last three full years for which figures are available (1927, 1928 and 1929) they have averaged over $6,750,000 annually. (Pet. Ex. 113, R. 941.) At the time of the trial Swift & Company had also not complied with the decree in certain substantial respects. It then owned about 60% of the voting stock of Libby, McNeil & Libby, which is engaged in the business of canning meat, vegetables, and fruit, and it had extensive stockholdings in stockyards companies. (R. 643; Pet. Ex. 151.[5])

Since the entry of the consent decree one of the five major defendants, sometimes called the Big Five, has been absorbed by another, thus further concentrating their joint power. In 1925, following a hearing before the Secretary of Agriculture under the Packers and Stockyards Act, the Secre-

[5] This is one of the exhibits which were not included in the printed record, but have been filed with the clerk of this Court, and, by consent of the parties, may be referred to in brief or argument. (R. 1172.) For convenience, these exhibits will hereinafter be designated, "not printed."

tary held that it was not a violation of that Act for Armour & Company to acquire Morris & Company. (R. 961–969.) Of the five original major defendants, now reduced to four, only the Swift and Armour groups have applied for modification or taken part in the present proceedings. The other defendants have stated in open court that, while they are not seeking modification of the decree, they would consent to such modification as the court might order provided it be made applicable to all of the defendants. (R. 1042.)

After an extended trial, in which the interveners actively participated, the court below filed an opinion in which it held, as the Government conceded, that it had power to modify the consent decree. (R. 1039, 1042–1043.) It concluded that since the date of the decree there had been great changes in the methods of distribution of foods and in the situation of those engaged in the packing industry. (R. 1056.) With reference to the prohibitions of the decree involving use of refrigerator cars and the handling of unrelated lines, it said that the sole question was "whether it is inequitable to further continue the provisions of the decree in these respects." (R. 1057.) The court also said (R. 1057):

> the entire change of conditions in the distribution of foods, those brought about by economic changes and practices, those brought about by the changes in the condi-

> tions and practices of the petitioners, and changes in the statutes and laws must be considered, and if by reason of those changes, any provision of the Decree can be modified without danger of monopoly, or the probability of acts in restraint of trade or unfair practices on the part of the petitioners, then the Decree should be modified.

It held that the decree should be modified to permit the defendants to manufacture and deal in unrelated lines, except at retail, and to use and permit others to use their distributive facilities in this connection. (R. 1059.) This appeal is from an order to this effect which the court entered. (R. 1060.)

The United States, the interveners, and appellees each requested the court to make certain specific findings of fact. (R. 1063, 1070, 1082.) The court did not make any of the findings requested by the Government or the interveners, but selected its findings from those requested by appellees. (R. 1063–1068, 1110–1114.) Both the Government and the interveners excepted to the court's findings. (R. 115, 116.)

The following summarizes the findings and conclusions of the court, including those contained in its opinion:

1. The court has jurisdiction to modify the decree. (Op. R. 1042–1043; Concls. of Law, 2–5, R. 1114.)

2. The chief purpose of the original bill was to prevent monopolistic control by the defendants of the supply and price of food supplies of the Nation; no such monopoly now exists and defendants are not engaged in any conspiracy to acquire such a monopoly; and this fact is a ground for modifying the decree. (Op. R. 1043, 1057; Fngs. 1–8, 14, 15, R. 1110–1112; Concl. of Law 1, R. 1114.)

3. Under the Sherman Act, and under the facts in this case, control of interstate commerce is material in determining the power to monopolize; defendants combined control over 70% of the output of all packers engaged in interstate commerce and appellees together control over 54% of that output, but size alone is no offense and there is now no combination or agreement in restraint of trade among the defendants; the instances of unfair practices and fixing of prices by defendants have been sporadic. (Op. R. 1044, 1050–1052; Fng. 3, R. 1110.)

4. None of the defendants is making large profits as compared with other dealers in foods; Swift & Company has paid dividends regularly for 44 years, and from 1920 to 1929 at the rate of 8%, and during the same time has added to its surplus a reserve of over $16,000,000; the percentage of profits of Cudahy Packing Company has exceeded Swift's during the same period; appellees' failure to explain the discrepancy between the Swift and Armour profits on substan-

tially the same amount of business largely weakens any argument based upon defendants' small earnings. (Op. R. 1048–1049.)

5. Swift and Armour each had sales amounting to more than $1,000,000,000 in 1920 and also in 1929. Only one other food company approached this volume, but its business can hardly be said to compete with that of the packers. (Op. R. 1047.)

6. Chain stores, both regular and voluntary, have increased in numbers and volume of business since 1920, but the buying power of the large chains does not seriously threaten defendants' business nor has the development of the former caused any great loss in defendants' profits; the chains do a very small part of the slaughtering business. (Op. R. 1046, 1049, 1050.)

7. There has been a wide increase in combinations among manufacturers of food products and a corresponding increase in horizontal integration among wholesalers of food,[6] but the profits of these companies are not properly comparable with those of the slaughtering packers. (Op. R. 1047–1048.)

8. Market information is now widely disseminated and appellees have now no peculiar advantage in this respect over their competitors or those who deal on the stockyards. (Op. R. 1053–1054.)

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[6] None of these so-called integrated concerns approaches either of appellees in size or volume of business, the total 1929 sales of the largest of them being less than $350,000,000 as compared with a 1929 volume for each of appellees of $1,000,000,000. (R. 718, Pet. Ex. 72, R. 888a.)

9. The passage of the Packers and Stockyards Act is a real change in conditions which necessarily would greatly limit the power of the defendants to acquire a monopoly; but while this Act and the present widespread dissemination of market news has diminished the danger arising from appellees' ownership of stockyards and their facilities, it would be unwise to modify the decree in this respect because there are many opportunities for secret preferences in the operation of stockyards and terminals and much for propaganda and distortion of news in newspapers, and because it is probable that Congress would have made the provisions of the Packers and Stockyards Act even more stringent had it not been for the decree. (Op. R. 1053, 1056.)

10. The original bill charged that, in addition to their numerous branch houses, defendants gained advantages over their competitors by the use of refrigerator cars which enabled them to distribute commodities other than meats with comparatively little increase in cost; if defendants are permitted to transport unrelated lines in their refrigerator cars, they would either pay less freight for the shipment of meats or be enabled to ship other commodities almost without expense, and the sale of both meats and other products would result in other economies; the use by defendants of excess space in their refrigerator cars and warehouses is sound as an economic and business

proposition and should not be prohibited unless absolutely necessary; the supply of refrigerator cars is ample; the use of automobile trucks for short-distance deliveries of food products has greatly diminished any advantage given the defendants by ownership of refrigerator cars. (Op. R. 1054–1055, 1057–1058; Fngs. 9, 10, 17, R. 1111, 1113.)

11. A great change in the method of distribution of meats is being brought about by the quick-freezing process; this will deprive local packers of the advantage they now have in that their meats are freshly slaughtered; it will enable defendants to avoid dumping their products on the market at unfavorable times and to make use of the increasing public demand for branded articles. (Op. R. 1055.)

12. The consent decree should not be modified to permit defendants to engage in retailing, because this would probably result in the almost complete annihilation of the independent retail grocer; appellees admit that if they entered into the retail business, they could in many ways reduce the cost of their products to their own stores, and there is a real danger of the misuse of the power to retail. (Op. R. 1058.)

13. There is no danger of monopoly on the part of the defendants arising from dealing, other than at retail, in commodities other than meats or from use of their distributive facilities in this connection. (Op. R. 1058.)

SPECIFICATION OF ERRORS TO BE URGED

The Government specifies as errors to be urged all of its assignments of error, numbered 1 to 13, inclusive. (R. 1118–1120.)

SUMMARY OF ARGUMENT

I. The consent decree having been entered without any findings of fact by the court, its purpose must be ascertained primarily from the allegations of the Government's bill. We submit that it sufficiently appears therefrom that the decree enjoined dealing in unrelated lines and use of defendants' distributive facilities in this connection, to guard against danger of monopolistic conditions and restraint of trade resulting from defendants' vast size, their nation-wide marketing organizations, their dominant position in the meat industry, and their ability to handle unrelated lines through their existing distributive facilities with comparatively no additional overhead expense.

II. Appellees may not collaterally question either the necessity for or the wisdom of the relief given the Government by the consent decree. Since the decree enjoined dealing in unrelated lines upon the ground that such dealing constituted a potential threat of illegal monopoly and restraint of trade, this restraint should not be removed unless appellees affirmatively show that the conditions which in 1920 were regarded as creating this danger have fundamentally changed. In support of modification appellees may not rely upon changes brought

about by the decree itself. It is no ground for modification that there is now no combination or agreement in restraint of trade among the defendants or present monopoly of interstate commerce in meats; this condition the decree intended to bring about. It is not surprising that defendants have not obtained a monopoly during the period that the decree has stripped them of the principal instrumentalities for attaining monopolistic control.

III. 1. Defendants' size and the extent of their operations are as impressive to-day as when the decree was entered. They are still the only national packers. In 1929 their combined sales were over $2,500,000,000, those of Swift and Armour were each over $1,000,000,000, while the 1929 sales of their 13 outstanding competitors totaled only $407,000,000. Each of appellees controls a great number of subsidiary companies and has purchased since 1920 numerous large meat-packing and produce companies. Notwithstanding the prohibitions of the decree against handling unrelated lines, appellees handle a very extensive variety of products, including several hundred meat items, butter, cheese, eggs, poultry, oleomargarine and cotton-seed-oil products, and by-products such as hides, fertilizers, glues, serums, soaps, and various greases.

In the meat-packing business defendants control over 70% of the output of all slaughterers whose products move in interstate commerce and appel-

lecs together control over 54% of that business. Defendants' share of the business in 1929 at least equalled their share in 1920.

We submit that the lower court in considering defendants' net profits as compared with those of their competitors, the decrease since 1920 in the dollar volume of defendants' gross sales, and the increased number of competitors, overlooked many important factors. An analysis of the evidence bearing upon these questions shows that they do not point to any change since 1920 in defendants' dominant position in the meat industry or in their relative size and power.

2. The Government's bill alleged that the facilities and organization which defendants had built up for the marketing of meats "were employed with comparatively no increase of overhead in the distribution of" unrelated lines. It was the theory of the decree that the competitive advantages which these facilities gave defendants, coupled with their vast resources and dominant position in the meat industry, empowered them to exercise monopolistic control and to restrain trade in unrelated lines. We contend that it was in order to insure against the "dangerous probability" of exercise of this power that the decree enjoined dealing in unrelated lines and use of defendants' distributive facilities for this purpose.

The same competitive advantages existing at the time of the entry of the decree exist to-day. By using their existing branch houses, appellees can

handle unrelated lines without additional warehousing expense. By loading these lines in their refrigerator route cars, they can transport them in many cases without payment of additional freight. These lines can be transported more expeditiously in their route cars than in the ordinary merchandise cars which other wholesale distributors of groceries use, and greater expedition in movement is a more potent competitive advantage to-day than in 1920. Appellees' employees testified that appellees could handle groceries and canned goods with practically no increase in distributing expense or overhead. The wholesale grocer's margin of profit is so small that, upon modification of the decree, defendants' advantage in lower transportation and warehousing costs would seriously jeopardize his position and increase the power of the defendants to restrain or monopolize trade.

If the decree causes some economic waste by preventing full utilization of defendants' existing facilities, modification of the decree would cause a corresponding economic waste by taking away business from wholesale distributors of groceries, thereby preventing full utilization of the latter's existing facilities.

3. The growth of chain retail stores, both "voluntary" and "regular," since 1920 and the alleged recent tendency toward integration of food manufacturers do not warrant modification of the decree. Only the largest of the regular or centrally owned chains are able to manufacture a material portion of their own supplies. Chain stores gen-

erally purchase their supplies from others. To the extent that defendants can supply most of the chain stores' requirements in meats, dairy and poultry products, and groceries and to the extent that, for the large chains, defendants are the only steady and reliable source of meats in the requisite quantity and quality, defendants may be expected to displace, if the decree is modified, the food distributors from which the chains now buy. The chain stores' dependence upon defendants for meat supplies may be used to push the sale of defendants' other products. The largest existing chain store organization now obtains 90% of its meat supplies from defendants in that section of the country where its meat business has been fully developed. The president of this company recognized the "tremendous embarrassment" that would be caused it by the loss of this source of supply.

The integration movement among food manufacturers has been too insignificant to affect the issues in this case. On the other hand, development of quick freezing is a change of much greater importance and one which tends to show that the decree should not be modified. The probable effect of this development will be to strengthen defendants' hold upon the meat-packing industry.

4. The Packers and Stockyards Act of 1921 subjected all large stockyards to public supervision, thereby strengthening the provisions of the decree intended to prevent unfair practices in the pur-

chase of livestock. But the injunction against dealing in commodities not related to the meat industry and that against use of defendants' distributive facilities for handling these commodities were not entered to prevent unfair practices in the purchase of livestock. The change in the law effected by the Act therefore has no substantial bearing upon the question of modifying these injunctive provisions. That part of the Packers and Stockyards Act which relates to packers does not constitute a material change in the law; it merely transfers to the Secretary of Agriculture jurisdiction over packers in respect of acts and practices already unlawful under the antitrust laws.

The widespread dissemination of market news is very remotely, if at all, related to the question of defendants' dealing in these lines.

5. The alleged good conduct of defendants since 1920 and their alleged lack of present intent to monopolize or restrain trade are not grounds for modifying the decree. The theory of the decree was that a general injunction against monopoly and restraint of trade would not afford adequate relief, but that such general injunctive provisions should be supplemented by certain specific prohibitions. The effectiveness of the decree is not a ground for removing these specific prohibitions. Modification of the decree may not be rested upon such an uncertain ground as speculation concerning the future good conduct of defendants.

Defendants' occasional participation in agreements in restraint of trade, in violation of the decree and during a time when appellees have been endeavoring to have the decree set aside or modified, raises serious doubt as to the wisdom of modifying the decree upon the ground of a change in the practices of defendants. The refusal of the lower court to permit defendants to own stockyards because of opportunities for secret preferences in their operation indicates that it was not convinced that they would refrain from unfair practices in the future. The fact that some of the higher Armour officials have illegally used their control over freight traffic to promote the sale of freight equipment manufactured by companies in which they were personally interested, and the fact that there is evidence of similar activity by Swift officials, at least suggest that defendants may make an unfair use of the power given them by their vast and varied activities to promote, irrespective of intrinsic merit, new business undertakings.

ARGUMENT

I.

THE PROHIBITIONS OF THE CONSENT DECREE WERE INTENDED TO PREVENT ANY DANGER OF MONOPOLISTIC CONTROL OR RESTRAINT OF TRADE BY DEFENDANTS

The 1920 decree having been entered without any findings of fact by the court, its purpose must be determined from the allegations of the Govern-

ment's bill. The bill states that it was filed to put an end to the combinations in restraint of trade described therein and to any and all monopolies which the defendants may have obtained in interstate commerce in livestock, meat products, and substitute foods; and to prevent the continuance of these unlawful combinations and monopolies. (R. 8.)

With reference to substitute foods, the bill alleges that defendants had set about controlling the supply of fish, vegetables (both fresh and canned), fruits, cereals, milk, poultry, butter, eggs, cheese, and other foods; that to accomplish this purpose they employed their refrigerator cars, route cars, auto trucks, branch houses, and storage warehouses "with comparatively no increase of overhead in the distribution of the substitute foods and unrelated commodities"; that they also employed this advantage "temporarily to fix prices so low as to gradually eliminate competition"; that they had obtained complete control in many of the substitute food lines and had made substantial headway in others; that their control was extensively and rapidly increasing. (R. 17.) The bill alleges that the business of Armour & Company in certain food items had increased from $6,396,000 in 1916 to $39,820,000 in 1918, that the defendants in recent years had acquired a large number of concerns manufacturing or selling substitute foods or unrelated commodities, and that they had, in addition, contracted for

the exclusive output of many other companies engaged in such manufacture. (R. 19.)

The bill prayed for an injunction against use of defendants' distributive facilities in the handling of unrelated lines to the extent that the court might deem necessary for the purpose of preventing defendants "from acquiring a monopolistic control over the trade or commerce in such commodities, or a control which may enable them to restrain the trade or commerce or artificially affect the price of any commodities in which the aforesaid defendants now deal." (R. 22.)

The Government's bill must also be read in the light of the charges made in the preceding report by the Federal Trade Commission on the meat-packing industry. In its letter[7] to the President transmitting its Summary of this report, the Commission said:

> If these five great concerns owned no packing plants and killed no cattle and still retained control of the instruments of transportation, of marketing, and of storage, their position would not be less strong than it is. (65th Cong., 2d Sess., H. R. Doc. 1297, p. 4.)

In its Summary[7] the Commission said:

> With the development of their branch house and car-route systems it is unneces-

[7] The Court may take judicial notice of these documents. *Tempel* v. *United States*, 248 U. S. 121, 130; *Jackson* v. *United States*, 230 U. S. 1, 18. See *Swift & Co.* v. *United States*, 276 U. S. 311, 319, *supra*.

> sary for the packers to go through the slow process of building up manufacturing plants. Their initial move is to contract for the output of factories. After the manufacturers have been under exclusive contract for a few years they become virtually "tied" to the packers, and unable to break away and develop new outlets for production.
>
> Already even the oldest and most strongly established wholesale houses are seeing line after line of their merchandise absorbed by the packers' branch-house system. First, they saw the packers encroach on the handling of butter, eggs, and cheese, then canned goods, then various kinds of "package goods," and now rice, sugar, coffee, and other staples are being increasingly handled by the packers. (*Ibid,* p. 19.)

The Commission pointed out that in 1917 Armour first undertook to handle rice and in that same year became, according to its vice president, "the greatest rice merchant of the world." (*Ibid,* p. 14.)

We do not contend that any presumption of unlawful conduct by the defendants arises from the allegations of the bill or the charges of the Commission, but we refer to them in order to explain the purpose of and reasons for the prohibitions of the decree. We do contend that it sufficiently appears that the decree rests upon the assumption that—in view of the size and power of the defendants, their domination of interstate commerce in

meat products and the competitive advantages given them by their nation-wide distributive facilities and organization—their dealing in unrelated lines and use of their distributive facilities in this connection created a threat of monopolistic conditions and restraint of trade, and that it was to guard against this threat that defendants were barred from such dealing and such use of their distributive facilities.

II

THE PROHIBITIONS OF THE CONSENT DECREE SHOULD NOT BE REMOVED UNLESS THERE HAS OCCURRED SINCE 1920 A FUNDAMENTAL CHANGE IN THE CONDITIONS WHICH AT THAT TIME WERE REGARDED AS CREATING DANGER OF MONOPOLISTIC CONTROL OR RESTRAINT OF TRADE BY DEFENDANTS.

In 1920 appellees agreed to the entry of a decree which prohibited them from dealing in unrelated lines and from using their distributive facilities for the transportation, storage, or sale of these unrelated lines. Appellees, having consented to these prohibitions, can not collaterally question either the necessity for or the wisdom of the relief given the Government. (*Swift & Co.* v. *United States,* 276 U. S. 311, 326–328, 331, *supra.*) It is not open to them to urge that, upon the basis of the facts charged in the Government's bill, the relief granted was inappropriate or unnecessary. Nor does the mere lapse of time give them any greater right to urge this objection.

If, as we contend, it was the purpose of the decree to restrain defendants from engaging in certain activities, upon the ground that these activities constituted a potential threat of illegal monopoly and restraint of trade, the restraints of the decree should not be removed unless appellees affirmatively show that the conditions which in 1920 were regarded as creating this danger have fundamentally changed.. To obtain modification of the decree it is not enough to show that monopoly by defendants of interstate commerce in foods is not attainable to-day. Appellees must show specific changes since 1920 which of themselves are sufficient to make such a monopoly or restraint of such commerce impossible. If such specific changes are not shown, the court may not decide as an original question that the relief given by the 1920 decree was directed against a threat of monopoly and restraint of trade which was illusory or nonexistent. To modify upon such a ground is to attack collaterally the validity of the original decree.

Neither may appellees rely upon changes brought about by the decree itself. Thus, the fact that the decree prevents defendants from owning any interest in stockyards and stockyard facilities is not a ground for removing the bar against dealing in unrelated lines since the decree intended to impose both forms of restraint. The court below, in reaching the conclusion that the decree could be modified without danger of monopoly, apparently gave some

weight to the "other restraints" imposed by the decree. (R. 1058.)

We also contend that the changed conditions relied upon to support modification must be such that their continued existence is independent of the will of the defendants. The lower court stated that one of the factors to be considered upon the question of modification was changes in the "practices" of appellees. (R. 1057.) It noted that by the great weight of the testimony there was now no combination or agreement in restraint of trade among the defendants. (R. 1050.) But this is a condition which the decree intended to bring about; it enjoined engaging in any combination in restraint of trade (R. 154) and using any illegal trade practices (R. 162). The fact that defendants have not generally violated these provisions is not a ground for modifying other provisions of the decree. The Government proved several instances of unfair practices and fixing of prices. (R. 803–806.) The court characterized these as "sporadic" and emphasized the lack of further evidence of this character. (R. 1050–1052.) The purpose of this testimony was to show that certain agreements and acts in restraint of trade had occurred in violation of the decree and notwithstanding appellees' campaign to have the decree set aside or modified and to illustrate the kind of conduct which might become more general if the restraints of the decree should be relaxed.

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Not only do appellees have the burden of showing changes which warrant modifying the decree, but, since they seek to modify a decree to which they "consented with their eyes open," the proof of such changes must be "convincing." *United States* v. *Discher,* 255 Fed. 719, 720 (S. D. N. Y.).

III

SINCE 1920 THERE HAS OCCURRED NO FUNDAMENTAL CHANGE IN THE CONDITIONS WHICH WERE THEN REGARDED AS CREATING DANGER OF MONOPOLISTIC CONTROL OR RESTRAINT OF TRADE BY DEFENDANTS

1. Defendants have Retained their Dominating Size and Power.

To-day, as in 1920, the defendants are the only packers operating on a national scale, and they reach through their marketing facilities every part of the country. (R. 646.) In 1929 their combined sales amounted to $2,616,224,000; those of Swift and Armour were each over $1,000,000,000, while Wilson's sales totaled $308,805,000 and Cudahy's $267,960,000. (Pet. Ex. 72, R. 888a.) On the other hand, the total sales of 13 competitors cited by appellees (including some processing concerns which do not slaughter) amounted in 1929 to only $407,476,000; those of the largest were less than $100,000,000; the next largest slightly over $50,000,000; and the remainder ranged from $10,500,000 to $46,32,000. (Pet. Ex. 71, R. 866a.)

Swift and Armour each controls over 50 subsidiary companies,[8] exclusive of stock holdings of their officers and directors (R. 649). Appellees have both pursued an aggressive expansion policy since 1920 in the lines in which they are permitted to deal. Swift has acquired 12 packing companies since 1920, most of which had annual sales prior to purchase ranging from $1,000,000 to $6,000,000; during the same period Swift purchased 26 produce concerns (dealing chiefly in dairy and poultry products), 7 of which had annual sales of $1,000,000 or over, the sales of the majority of the others ranging from $200,000 to $500,000 annually. (Pet. Ex. 147, not printed.) In the case of Armour, the Morris & Company acquisition is outstanding. Armour also acquired another packing company with annual sales of over $8,000,000; of the remaining 35 Armour acquisitions, the majority were of produce concerns, the total annual sales of which amount to many millions of dollars. (Pet. Ex. 125, not printed.)

Defendants' meat products comprise 25% to 35% of the volume of the average retail foods store. (R. 624, 704, 746, 749, 766.) Appellees are among the leading producers and distributors of such food items as butter, cheese, eggs, poultry, oleomargarine, and cottonseed-oil products (*infra*, p. 37) and

[8] These subsidiaries (other than stockyard companies wholly or partially owned by Swift, R. 642–643) are listed in the Appendix, *infra*, pp. 76–79.

their by-products include hides, fertilizers, glue, serums, soaps, and greases of various kinds.[9]

If not restrained by the decree, not only may defendants use the potential power which arises from their volume of business and diversity of products temporarily to undersell particular food lines in particular localities for the purpose of destroying competition, but they may use their dominant position in interstate commerce in meats to force a full line of their products upon retailers, wholesalers, and chain stores.

The court below properly accepted as the index of defendants' and appellees' control of the meat business their proportion of the total business of slaughterers whose products are shipped in interstate commerce. (R. 1050.) The packers whose slaughtering plants are near points of production of livestock transport the finished product to consuming markets, whereas those packers whose slaughtering plants are near consuming markets must bear the cost of transporting waste portions of animals and of losses resulting from shrinkage in transit, death of livestock, or injury to hides. (R. 29, 441, 449, 537.) The higher operating costs of local packers is graphically reflected in the fact that they sell their meats at from 1¢ to 3¢ a pound above the prices charged by defendants. (R. 430, 433, 441, 442, 448, 453, 660.)

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[9] The diverse products manufactured and sold by Swift, as disclosed by its Year Books (Gov. Ex. 101, not printed), are set forth in the Appendix, *infra*, pp. 79–80.

Using the test, therefore, of the output of all slaughterers whose products are shipped in interstate commerce, the court below said (R. 1050):

> The petitioners, Swift & Company and Armour & Company, together control over 54%[10] of the output of all packers engaged in interstate commerce, and all the defendants combined control over 70%[10] of that business so that, if the four defendant groups should act together under any agreement or combination, they would unquestionably be able to control the greater part of this interstate business and this would be the case even if Swift & Company and Armour & Company alone should combine.

The picture is not very different if comparison is made with the total business of all slaughterers reporting under the Packers and Stockyards Act, including those which do not ship their products in interstate commerce. On this basis, defendants did 65.2%, and appellees 50.46%, of the business in 1929. (Gov. Ex. 19, R. 1036h.) Of the total business of those reporting under the Act, including slaughterers which do not sell in interstate commerce and processors which do not slaughter, defendants did 56.01% of the business in 1929 and appellees 43.33%. (Gov. Ex. 19, R. 1036h.)

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[10] The percentages are based upon Government Exhibit 19, Record 1036h. Government exhibits numbered from 7 to 27, inclusive, are compiled from reports filed with the Department of Agriculture by packers subject to the Packers and Stockyards Act. (R. 411, 725–726.)

The following shows the proportion of the total federally inspected slaughter in 1920 and in 1929 done by Swift, Armour, Swift and Armour combined, and the defendants combined (percentages being based on figures shown in Pet. Exs. 7 and 10, R. 811–812, 816a):

	Swift		Armour		Swift and Armour		Defendants	
	1920	1929	1920	1929	1920	1929	1920	1929
Cattle	23.8	25.8	30.0	27.0	53.8	52.8	71.5	69.4
Calves	31.1	33.4	24.8	24.6	55.9	58.0	66.7	71.4
Sheep, etc	30.1	36.6	29.1	28.8	59.2	65.4	78.0	84.9
Hogs	17.7	19.5	21.2	17.1	38.9	36.6	51.2	47.9

No radical change from 1920 is shown; in fact no definite trend of any kind is indicated. Swift's percentage of the business has slightly increased and Armour's slightly decreased. The Armour percentages for 1920 are based on the combined business of Armour and Morris and some falling off in their separate totals probably resulted from the merger. For the defendants as a whole, the percentage increased under two classifications and decreased under two.

Comparison of the 1920 and the 1929 percentages of total estimated United States slaughter done by Swift, Armour, Swift and Armour combined, and the defendants combined shows that the appellees combined, as well as the defendants combined, had a greater percentage of the total in 1929 in four out of the five classifications. The figures are as follows (Pet. Ex. 10, R. 816a):

	Swift		Armour		Swift and Armour		Defendants	
	1920	1929	1920	1929	1920	1929	1920	1929
Cattle	14.8	17.5	18.6	18.4	33.4	35.9	44.4	47.2
Calves	15.0	18.0	12.0	13.3	27.0	31.3	32.2	38.6
Sheep, etc	23.2	28.4	22.3	22.3	45.5	50.7	59.8	65.8
Hogs	10.9	12.6	13.0	11.1	23.9	23.7	31.4	31.0
Meat and lard	13.2	15.2	15.8	14.1	29.0	29.3	38.2	38.3

The only figures on the production of lard compounds and substitutes and of oleomargarine are for 1916 and 1927. Of the total United States production of these commodities, Swift and Armour (including Morris) produced of the former 34% in 1916 and 35% in 1927 and of the latter they produced 38% in 1916 and 30% in 1927. (R. 725.) From 1920 to 1930 Swift's production of crude cottonseed oil increased from 47,000,000 to 68,000,000 pounds, or 49.0%, and its production of refined cottonseed oil increased from 160,000,000 to 237,000,000 pounds, or 48.1%. (R. 716.) The total United States production of crude and refined cottonseed oil increased from 1920 to 1929 (1930 figures not being available) 38.4% and 48.0%, respectively. (R. 717.)

In 1929 appellees' combined domestic sales of cheese, butter, and poultry were 22.74%, 10.26%, and 8.21% of the total 1929 United States consumption of these foods (percentages being based on Petitioners' Exhibits 114, 138–140, R. 942a, 954–955).

The court below concluded that the net profits of the defendants are small as compared with those

of their competitors. (R. 1048.) The court based this on the percentage of profits to sales and the percentage of profits to net worth of defendants, on the one hand, and of all packers reporting under the Packers and Stockyards Act, on the other hand. Net worth is an unreliable basis for comparison unless it appears that the same methods of accounting have been used in constructing the balance sheets which are compared. The percentage of profits to sales is also not a reliable basis for comparison since a large business may operate upon the principle of large volume, quick turnover, and small margin of profit, when a smaller business receives a higher margin of profit on lesser volume and slower turnover. The Government's original bill alleged that defendants have always asserted a very low rate of profit on sales. (R. 18.) In its answer to this bill Swift alleged that packing companies operate on a small margin of profit. (R. 40–41.) Furthermore, both of the court's tables include processors which do not slaughter but buy slaughtered products and, as the court points out, the processing business is relatively much more profitable than the slaughtering business. (R. 1048.) If the defendants' net profits are compared with the net profits of all slaughterers who sell their products in interstate commerce and if defendants' total business is compared with the total business of all these slaughterers, the defendants' percentage of total profits is shown to have been consistently higher than their percent-

age of the total business. This has also been true for Swift and for Swift and Armour combined. We believe that the following summary of Government Exhibits 21–23 (R. 1038a) demonstrates the error in the court's conclusion that defendant's net profits have been small as compared with those of their competitors:

	Swift		Armour		Defendants	
	Per cent of business	Per cent of profits	Per cent of business	Per cent of profits	Per cent of business	Per cent of profits
1924	25.14	21.91	29.51	28.40	69.42	63.27
1925	23.20	34.49	26.53	32.41	63.27	75.97
1926	28.10	38.29	25.09	19.94	66.22	75.91
1927	26.73	84.01	29.02	3.41	70.99	[1] 103.27
1928	26.73	33.12	28.25	25.33	70.87	69.13
1929	27.47	36.33	28.21	27.25	71.89	77.63
Average	26.23	41.36	27.77	22.79	68.78	77.53

[1] Apart from defendants, there was a combined net loss for this year. (R. 732.) About 70% of the losses were sustained by about six concerns. (R. 733.)

The court below failed to note that both of the tests which it applied show that defendants are operating now on a very much more profitable basis than when the decree was entered. Their combined earnings were 0.18% of their total sales in 1920; in 1929 they were 1.06%, and for the years 1923 to 1929, inclusive, they averaged 1.30%. (Pet. Ex. 72, R. 888a.) Their combined earnings were 0.88% of their net worth in 1920; in 1929 they were 4.55%, and for the years 1923 to 1929, inclusive, they averaged 5.02%. (*Ibid.*) For the years 1917 to 1922, inclusive, Swift's profits averaged 6.81% on investment and 1.37% on sales. (Swift's 1923

Year Book, pp. 43–44, Gov. Ex. 101, not printed.) For the years 1923 to 1929, inclusive, its profits averaged 6.42% on investment and 1.57% on sales. (Pet. Ex. 72, R. 888a.)

The court below said that there were "some rather singular facts as to the profits of Swift and Armour, which are not explained," that the failure to account for Swift's higher profits upon substantially the same volume of business "largely weakens the argument of the petitioners based upon their small returns in business," and that "there has been a failure to make a full disclosure of the facts in this respect." (R. 1049.) Both the president of Armour and the vice president of Swift refused to offer any explanation for the difference between the earnings of the two companies. (R. 633, 649.) In addition, appellees submitted no figures segregating profits on domestic business from profits on foreign business or showing separately the earnings of the different branches of their business. The record indicates that, at least in the case of Armour, unfavorable results in foreign business, and in fertilizers and hides and leathers, substantially affected earnings in several years. Armour's annual report for 1926 states that the company's domestic operations "were conducted on a satisfactory basis" and that it was the results of its business in the South American field which caused the company to omit dividends on Class A common stock. (Pet. Ex. 126, not

printed.) Armour's annual report for 1925 gave as one of the two reasons for lower net earnings than in 1924 "the unfavorable conditions surrounding our South American business," referred to "great losses" which had "often resulted" in its fertilizer business in the past, and said that the leather business ever since the war had "suffered under the burden of excessive inventories and supplies." (Pet. Ex. 126, not printed.)

The court below, instead of considering the figures bearing upon defendants' relative percentage of the meat-packing business in 1920 and 1929, emphasized that defendants' sales in 1929 were less than in 1920. (R. 1045.) But a mere comparison of the dollar value of sales in these two years is without significance. Aside from the fact that sales in 1929 would be materially reduced by the abandonment of unrelated lines, which abandonment, while incomplete, was yet substantial; aside from the very great effect upon dollar volume of a change in the price level over a ten-year period; aside from the many diverse additional factors which might affect the volume of business of corporations having combined sales of over $2,500,000,000, such as changes in foreign business and the partial loss of business to competitiors probably resulting from the acquisition of Morris & Company by Armour; examination of defendants' sales year by year over the period 1920 to 1929, inclusive, presents an entirely different picture. From 1920 to

1922 their combined sales decreased from $2,971,-121,000 to $1,905,561,000, a decrease of 35.9%. (Pet. Ex. 72, R. 888a.) During the following seven-year period their sales increased each year except in 1924, when the decrease was less than three-tenths of one per cent and in 1926, when the figures for two of the four companies cover only ten months. (*Ibid.*) The gradual increase in defendants' sales from 1922 to 1929 amounted altogether to $710,663,000, or 37.3%. (*Ibid.*)

The court below also said that the large percentage increase in the business of certain other packers "attest the nature and extent of the competition in this business." (R. 1045.) The greatest percentage increases mentioned by the court are from $7,000,000 to $46,000,000, or 550%, and from $3,-750,000 to $22,000,000, or 486%. But mere percentage increases based upon initial small sales do not attest the nature and extent of competition when the total business of these competitiors, following the increase, is in one case less than 1%, and in the other less than 2%, of defendants' 1929 business. Furthermore, stimulation of competition was one of the effects contemplated by the decree.

The court below likewise referred to the increase from 1925 to 1929 in the number of packers reporting under the Packers and Stockyards Act. (R. 1045.) The figures which it cites are taken from Government Exhibit 7. (R. 1036a–e.) Beginning with 1926, the concerns shown in this exhibit are classified into "federally inspected slaughterers,"

"nonfederally inspected slaughterers," and "miscellaneous, including nonslaughterers." During this period the total concerns reporting increased by 252, while the total federally inspected slaughterers increased by only 17. Therefore all but 7% of the increase represents either slaughterers which do not sell their products in interstate commerce or processors which do not slaughter. Furthermore, the Assistant Chief of the Packers and Stockyards Division of the Department of Agriculture, who supervised the preparation of this exhibit, testified that the number of reporting packers had increased since 1924 due to the Department's greater effort to ascertain what packers were required to report under the Act. (R. 725–726, 731.) He stated that he did not know to what extent the increase in reporting concerns represented established firms which had not previously reported rather than new packers actually coming into the field. (R. 731.)

The figures in Petitioners' Exhibit 4 (R. 810) showing the number of slaughtering and meat-packing establishments in 1921 and 1927, classified according to the value of their products, have no evidentiary value because they represent, not separately owned concerns, but merely separate plants (R. 389).

2. There has been no Change since 1920 in the Opportunity for Monopolistic Control and Restraint of Trade Afforded by Defendants' Use of Their Distributive Facilities in Handling Unrelated Lines.

The original bill alleged that the use by defendants of the facilities and organization built up for the marketing of meats gave them a competitive advantage in the distribution and sale of unrelated lines which, coupled with their vast resources and dominant position in the sale of meats, empowered them to exercise monopolistic control or restraint of trade. (*Supra*, pp. 5–6.) To prevent the exercise of such power the defendants were enjoined from dealing in unrelated lines. We contend that the same competitive advantages existing at the time of the entry of the decree, and upon which the restrictions against dealing in unrelated lines rest, exist to-day, perhaps to an even greater degree than in 1920. We therefore contend that in this respect no change in conditions has occurred which warrant modification of the decree.

The principal facilities used in the sale of meats, which the bill alleged "were employed with comparatively no increase of overhead in the distribution of" unrelated lines, were branch houses (together with their sales organization) and route cars. (R. 12–13, 17.) Branch houses are equipped with facilities for cooling and preserving meats, and each is under the charge of a branch-house manager, under whose direction a branch-house sales organization sells to retail and wholesale butchers, to purveyors, hotels, and other large consumers. (R. 13.) Route cars are refrigerator cars which are hauled in local freight trains and which start from a packing plant or branch house

and are routed to reach specified towns on specified dates to fill orders taken in advance by salesmen. (R. 13.)

In their answers to the Government's bill, appellees admitted their ability to handle unrelated lines without a proportionate increase in expense, but alleged that the resulting economies were in the interest of the consumer. (R. 43, 69.) Armour's answer alleged that the defendants were able to reduce the cost of marketing unrelated lines "through complete and efficient operation and use of their facilities and branch-house space, thereby rendering better and more efficient service." (R. 70–71.) This is the same contention now made in support of modification of the decree.

Defendants claim they can take on unrelated lines without substantially increasing their present branch-house facilities. (R. 528, 647, 678.) There would be other economies. The general superintendent of Armour branch houses testified (R. 657):

> We could handle nonmeat products along with meat products through our branches, with our existing facilities, and distribute our selling costs over a wider line without increasing our fixed charges at all, nor, we believe, our delivery charges either to any extent.

A district manager of this company said (R. 678):

> If we could handle other lines through our branch houses and trucks, it would help us

> utilize this idle space, reduce our overhead, and operate our trucks at full capacity, and would not require any additional expense in these branches, either for salesmen, rents, office force, or management.

The assistant manager of Swift's branch-house department testified (R. 528):

> Swift branch houses have not been used for handling groceries or canned goods. We did this to quite an extent in 1916 and 1917 and could do so now without any increase in our sales organization and with practically no increase in our distributing expense or overhead.

In the court below appellees contended that they are burdened by excess branch-house capacity. To the extent that their surplus space is due to the injunction against dealing in unrelated lines, appellees can not complain without showing that this result was not contemplated by the parties to the consent decree. They have made no such showing.

We also submit that appellees have not shown any greater change in the matter of unnecessary branch-house capacity than can be attributed to the ordinary fluctuations of trade and business. In 1920 Swift had 371 branch houses and in 1930 it had 440. (R. 525, Pet. Ex. 143, R. 956.) In 1920 Armour had 398 and Morris 167 branch houses; in 1930 Armour had 391 branch houses, but after Armour acquired Morris & Company many of the branch houses of the two companies were closed to

avoid duplication of facilities. (R. 613–614, Pet. Ex. 153, R. 959.) That there has been no falling off in the proportion of the business handled by branch houses is shown by appellees' own figures. For Armour and Morris combined, the branch-house sales in 1920 ($681,792,000) were about 74% of their domestic sales of edible products ($925,-560,000), while in 1929 their branch-house sales ($571,792,000) were about 79% of their domestic sales of edible products ($723,808,000). (Pet. Exs. 107, 120, R. 938, 943.) There are no figures on the dollar value of sales of edible products by Swift prior to 1929, but from 1920 to 1929 Swift's total sales decreased about 1.6%, but its branch-house sales increased about 7.5%. (Pet. Exs. 72, 144, R. 888a, 957.)

Appellees' contention that with the growth of chain stores a large quantity of business formerly done through branch houses is now done through carload deliveries direct from packing plants to chain stores is not sustained by the evidence. Swift's total sales of edibles in 1929 (1930 figures not available) amounted to $816,250,000, of which $599,726,000 was done through branch houses. (Pet. Ex. 137, R. 954.) For the year ending September 30, 1930, Swift's total sales to chain stores amounted to $71,550,000, of which less than half was delivered in carload quantities. (R. 641–642.) It thus appears that only about 4% of the business of Swift's branch houses has been converted into

carload sales to chain stores direct from packing plants.

While appellees contend that the excess space in their branch houses is burdensome, Swift's 1927 Year Book (p. 33) refers to a study made in 1925 by the National Distribution Conference of the cost of distribution in 17 wholesale trades, which found that the cost of packer branch-house operation was the lowest of the 17 trades investigated. (Gov. Ex. 101, not printed.)

The Government's bill, upon which the consent decree was entered, alleged that defendants' route cars (also called peddler cars) gave them a competitive advantage in that they could distribute unrelated lines with comparatively little increase in overhead. (R. 17.) This advantage is no less today. The use of these cars permits both a saving in transportation charges and quicker deliveries.

There is a minimum tariff for the movement of refrigerator cars based upon a minimum loading. (R. 1054.) Many of appellees' route cars now move loaded below the minimum. (R. 668, 673.) Since route cars must operate regularly and according to schedule because "the trade in each town knows when to expect the car and depends upon it" (R. 612), cars often must proceed although the orders taken for shipment are less than the minimum loading. If groceries could also be carried to make up the minimum, they could be carried, under the tariffs generally applicable, without payment of additional freight. (R. 671, 673, 674.)

The transportation costs of the wholesale grocer, on the other hand, are substantial. (R. 775, 779, 782.) His margin of profit is so small that any advantage enjoyed by defendants in distribution costs would seriously jeopardize his position. (R. 744, 775, 779.) One wholesale grocer testified that he could not compete with Armour and Morris in the sale of canned milk because they ship the milk in refrigerator cars which are underloaded and "the meat carries the load," so that they can undersell him by the amount of his transportation charge. (R. 787.)

In *Swift & Company* v. *United States,* 196 U. S. 375, *supra,* this Court said (p. 402):

> It is obvious that no more powerful instrument of monopoly could be used than an advantage in the cost of transportation.

The exact quantity of unused route car capacity is not shown, but it is clear that it is substantial because appellees rely upon it to show one of the important advantages which will accrue to them from the handling of unrelated lines. This advantage is not destroyed by the fact, to which the court below refers, that the "automobile truck has become the chief method of delivery of food products up to distances of from seventy-five miles to as much as one hundred and fifty miles in some instances." (R. 1055.) For corresponding distances transportation charges by truck and by less than carload freight are approximately the same. (R. 789–790.) In addition, transportation by auto truck is advan-

tageous only for distances up to about 125 miles, while route cars often travel as much as 600 miles. (R. 666.) When the transportation advantage is added to the warehousing advantage resulting from the use of branch houses, the possibility that the wholesale grocer could survive competition with defendants is remote. Vegetable canners also testified that a substantial quantity of their shipments are made in less-than-carload quantities, and any transportation advantage enjoyed by the packers would seriously threaten their ability to compete. (R. 790, 792, 793.)

If defendants are permitted to handle unrelated lines they will have a further advantage over competitors in making quicker deliveries through their route cars. The movement of these cars is expedited because they carry perishables. (R. 441, 470.) The Interstate Commerce Commission has found that shipments in refrigerator cars are handled more expeditiously than those in the ordinary merchandise car. *National Wholesale Grocers Association* v. *Director General,* 62 I. C. C. 375, 387; *In the Matter of Private Cars,* 50 I. C. C. 652, 687. Groceries carried in route cars would obtain the benefit of this expeditious movement.

Expeditious movement is a more serious competitive advantage to-day than in 1920 because the great expansion in recent years of "hand to mouth" buying of food products has increased the importance to the retailer of quick and prompt deliveries. (R. 447, 518.) Swift owns 5,509 re-

frigerator cars and Armour 6,766 and Swift leases additional cars. (R. 639, Pet. Exs. 121, 143, R. 944, 956.) Use of these cars would enable appellees to offer to retailers a delivery service for nonperishables equal to that now given in the case of perishables only, service which their competitors, who do not use refrigerator cars, could not furnish.

Further economies will accrue to defendants, if permitted to handle unrelated lines, from their ability to carry groceries in the same trucks which now deliver principally meats and because the same salesman who sells meats can at the same time also take orders for groceries. (R. 223, 308, 605, 623.) One of appellees' witnesses, speaking of defendants, said (R. 470):

> They have the advantage of distribution facilities superior to those of any other organization in the country, covering the country in a network with about 1,000 branch houses between Armour and Swift together, and a complete merchandising organization ready to add additional items with almost no additional cost, at least relatively small additional cost.

Appellees may contend that, if they deal in unrelated lines, a portion of the transportation and wholesaling costs which are now charged to their present products alone will be allocated to these unrelated lines, so that it can not be assumed that, as compared with their competitors in these lines, appellees will have the advantage of practically no

costs of distribution. But in that case the lowering of the cost of handling meat products will increase their competitive advantage in this field and add to the threat of monopolistic control and restraint of trade against which the consent decree was directed.

It is also immaterial that the supply of refrigerator cars is ample. (R. 1055.). Large grocery distributors do not handle fresh meats and therefore have no use for refrigerator cars. And there is no showing that in 1920 those who desired refrigerator cars were unable to obtain them.

3. Defendants' Power to Attempt to Monopolize or Restrain Trade in Unrelated Lines is not substantially affected by Changes since 1920 in the Methods of Distribution of Foods.

Appellees contend that there have been substantial changes since 1920 in the methods of distribution of foods. They instance the growth of chain stores and an alleged integration movement among manufacturers of foods, and they cite the imminent use of quick-frozen foods.

The recent development of chain stores undoubtedly represents a changed condition, but its effect upon the power of defendants to attempt to monopolize or restrain trade in unrelated lines is not substantial. Chain stores are classed as "regular" or "integral," i. e., centrally owned chains, and "voluntary" chains composed of independently owned stores. (R. 1045.) There are about 551

voluntary chains which do about 25% of the total retail grocery business. (R. 510, 519.) The primary object of the voluntary chain is to emulate the regular chain. (R. 509.) The leading type of voluntary chain is that sponsored by one or more wholesalers who supply merchandising and managerial assistance and sell to retailer members at reduced prices in return for the agreement of the latter to purchase a stipulated proportion of their grocery items from the wholesalers. (R. 508–518, 761–770, 1045–1046.) Voluntary chains have done much to improve store management and to increase cooperative advertising and joint buying, principally of dry groceries. But voluntary chains are not to be regarded as composite units. One of the greatest difficulties in the voluntary chain movement has been that of securing the necessary cooperation of the members; for that reason the buying power of voluntary chains has not been as effective as that of regular chains. (R. 767.)

There is no evidence that voluntary chains do any of their own manufacturing. Voluntary chains will continue to purchase from their present wholesaler associations or from the manufacturers with whom they now deal only so long as it is to their advantage to do so. They are all potential customers of the defendants if the latter can offer them better terms than those now obtained. (R. 758.) With the consent decree modified to permit dealing at wholesale in unrelated commodities, defendants

will be in a position to supplant the wholesale grocer as the principal source of supply for voluntary chains. One inducement which defendants could then offer would be their ability to supply retailers with practically all their needs in both meat and grocery lines at the low prices which would result from defendants' competitive advantage in handling both lines. (*Supra,* pp. 45–51.) Defendants could also offer reductions in meat prices to induce the purchase of groceries, or *vice versa.* It follows that voluntary chains are not a factor which may be expected to supply any restraint upon the power of defendants to control or restrain trade in unrelated lines. It may rather be expected that voluntary chains would, to a substantial degree, come under the domination and control of defendants.

The situation with reference to regular chains is not far different. There were in 1929, 60,000 regular chain stores as against 300,000 independent retail food stores. (R. 519, 567.) Regular chain stores control only 35% of the total retail food business. (R. 519.) Even if regular chain stores manufactured their own supplies, defendants, if permitted to deal in unrelated lines, would still be in a position to acquire control of any of the commodities used by independent and voluntary chain stores doing together 65% of the total retail business.

Large regular chains do a small amount of manufacturing. (R. 491, 495, 497, 564–566, 740.) Only

the largest chains could conceivably attempt to manufacture any substantial proportion of their own needs. Chains operating 1,000 stores or over, nine in number, own 60% of the total regular chain-owned retail stores. (R. 567.) Assuming uniform volume per store, these nine large chains do only 21% (60/100×35/100) of the total retail food business. Smaller chains whose volume of business would not warrant the manufacture of their own supplies, are like the voluntary chains, potential customers of defendants. To the extent that defendants can supply most of the retail stores' requirements in both meat and grocery lines and dairy products, and to the extent that defendants will be able to reduce prices below those of their competitors, defendants will be in a position to control substantial proportions of the business of a large number of chain stores.

The court below found that chain stores "are largely dependent upon" appellees for their meat supplies. (R. 1049.) This is particularly true for large chain-store organizations. For these organizations, defendants are the only steady and reliable source of meats in the requisite quantity and quality. (R. 498, 743–745, 748, 750.) The Great Atlantic and Pacific Tea Company in its eastern division, where its meat business is fully developed, purchases 90% of its meat supplies from defendants. (R. 744.) The president of this company said (R. 744):

> I really think it would cause our company tremendous embarrassment—I do not know what we would do—if we lost those channels.

Defendants' great size and vast distribution facilities can be used to attain a position in unrelated lines approaching that which they now enjoy in the meat-packing industry. The lower court, in refusing to permit defendants to retail, said (R. 1058):

> The control by the defendants of the great amount of interstate commerce in meats and other articles from the producer to the consumer would probably result in the almost complete annihilation of the independent retail grocer, already a minority in volume of business.

The same power which, if defendants were permitted to engage in retailing, "would probably result" in the annihilation of the independent retail grocer (and probably also many chains) will give defendants the power to control at least substantial proportions of the supplies which those stores require.

The extent of the integration movement among food manufacturers has not been great enough to affect the issues in this case. Examples of the "integrated" companies which appellees cite are National Dairy Products Company, General Foods Corporation, Standard Brands, Inc., all amalgamations of previously existing smaller companies. None of the companies of this character cited by

appellees does a total annual business, even approaching in amount that of either of appellees, and all together do not enjoy a position in the foods business generally that defendants enjoy in the meat-packing industry. The total annual business of none of them is over $350,000,000 (roughly 35% of the total sales of each of appellees) and most of them sell less than $100,000,000 annually. (R. 718.) They manufacture principally specialties, particular branded articles that have acquired a national reputation through advertising, but which, altogether, form an insignificant portion of the variety of commodities sold in foods stores and of the commodities in which defendants are forbidden to deal by the consent decree. (R. 499, 500, 502, 551, 719.)

Appellees complain of their inability under the decree to reduce costs, like other manufacturers of foods, by integrating and diversifying their products. In so far as they are thus limited, they consented to the limitation. Moreover, the diversity of the commodities which they now handle—several hundred edible meat products, inedible by-products, dairy and poultry products—is greater than that of any of the integrated food companies to which they refer. (*Supra*, pp. 33–34, R. 616, 719.) Furthermore, as the president of Armour testified, "Diversification of product is important only as it goes to the volume of business, as it carries the overhead." (R. 615–616.) Not only does appellees' volume of business far exceed that of any inte-

grated food company, but their products comprise a greater proportion of the requirements of the average retail store than do the products of their nearest foods company competitor. (R. 704, 746.)

Appellees have contended that the growth of integrated foods companies indicates a trend which is bound to continue and increase. With the collapse of the investment market, further amalgamations among manufacturers of foods is not likely, at least in the immediate future. (R. 700–701.)

Another change in methods of distribution urged by appellees is that which is expected to follow the development of the quick-freezing process. By this process meats are frozen at temperatures of from 29° to 50° below zero, making it possible to keep them as long as a year without impairing their texture, flavor, or quality. (R. 461, 772, 1055.) The testimony was unanimous that in the near future meats will generally be sold in a quick-frozen state. (R. 755, 770–771.) Quick-frozen fish is already being sold extensively in competition with fresh fish. (R. 464, 503, 506.)

The court below seemed to regard the imminent use of quick freezing as one of the changes in conditions warranting modification of the decree. (R. 1055.) But the probable effect of the development of that process will be to strengthen defendants' hold upon the meat-packing industry. The court pointed out that the advantage local slaugh-

terers now have in that their meats are freshly slaughtered will disappear. Without this advantage, which enables them to charge higher prices for their products than defendants charge (*supra*, p. 34), it is doubtful whether the local slaughterers can survive. Secondly, the ability of defendants to package and brand their quick-frozen meats will, as the court below said, enable packers to profit by the increasing tendency of the consuming public to rely upon brand designations to insure obtaining the quality once tested and found satisfactory. (R. 470–471, 1055.) The defendants, who sell and advertise nationally, are in a better position than other packers to profit by the sale of packaged and branded meats. Finally, as the court below said, with the development of quick freezing the necessity for immediate disposal of slaughtered goods will disappear. (R. 1055.) Appellees have urged that monopoly in the meat-packing industry is impossible on account of the perishability of the products handled, requiring their sale immediately at whatever price they will bring. (R. 628, 683.) Depletion of profits due to great losses allegedly incurred from compulsory dumping of slaughtered products at a time when there is no demand therefore will also be eliminated when meats are quick frozen. (R. 1055.) Another important effect, which the court failed to note, is that the alleged ease with which anybody can enter the slaughtering business (R. 467) will

disappear as large investments in quick freezing apparatus become necessary.

With the development of quick freezing, patents for the first time will play an important rôle in the meat-packing industry. The best known process is the Birdseye owned by General Foods Corporation, for which that company paid $22,000,000. (R. 1055–1056.) It uses a double contact machine freezing the meat from both sides, accomplishing the freezing operation in one-fourth the time required by a single-contact apparatus. (R. 462.) General Foods Corporation's patents also include a refrigerator display case, a so-called plate freezer of the type that will be used in retail stores to keep and display quick-frozen products. (R. 466.) Swift and Armour are experimenting on apparatus of their own, the character of which is as yet undisclosed. (R. 630, 648.)

4. Public Control of Stockyards and Development of Market Information since 1920 do not Warrant Modification of the Prohibitions of the Decree against Dealing in Unrelated Lines.

The court below said (R. 1052–1053):

> * * * stockyards are now under the control of the Department of Agriculture by virtue of the Packers and Stockyards Act of 1921. This act forbids unjust, unreasonable or discriminatory charges, regulations, or practices. It requires all changes in

charges to be made public, and they are made subject to the approval of the Secretary, who may himself fix the rates or charges, and who is empowered upon investigation and hearing to make awards of damages to the parties injured. This, of course, is a real change in conditions and one which necessarily would greatly limit the power of the defendants to acquire a monopoly.

The provisions of the Packers and Stockyards Act bringing under public control the large stockyards of the country have little bearing upon the question whether defendants should be permitted to manufacture and sell commodities unrelated to meat products. Even if it be assumed that this statute has made it impossible to maintain serious abusive practices in the purchase of livestock, the relationship between elimination of these practices and the prohibition of the decree against dealing in unrelated lines is, at most, extremely indirect. The decree itself contemplated bringing to an end unfair practices in the purchase of livestock and at the same time the manufacture and sale by defendants of unrelated lines. To accomplish the first end, ownership of stockyards and stockyard facilities was forbidden. The decree enjoined dealing in unrelated lines in order to take from defendants the power to monopolize or restrain trade in these lines, a power given them, it

was alleged, by their vast organization and financial strength, their dominant position in the meat business, and the competitive advantages resulting from their far-flung distribution and marketing facilities. These conditions are not materially affected by the elimination of abuses in the purchase of livestock.

We submit that there is inconsistency in the determination by the court below that the enactment of the Packers and Stockyards Act is not a sufficient change in conditions to warrant removing the prohibitions of the decree against ownership of stockyards and stockyard railroads, but that this enactment is "a real change in conditions" bearing upon a "danger of a monopoly on the part of the defendants arising * * * and from dealing in commodities other than meats." (R. 1053, 1058.)

Apart from the provisions of the Packers and Stockyards Act which relate to stockyards, the Act does little more than confer upon the Secretary of Agriculture jurisdiction over packers in respect of acts and practices which in 1920 were illegal under the Sherman Act, the Clayton Act, or the Federal Trade Commission Act, and to transfer to the Secretary of Agriculture, in the case of packers, the jurisdiction conferred upon the Federal Trade Commission by Section 6 of the Federal Trade Commission Act to require the filing of reports of their business. These provisions of the Act, therefore, if relevant

to the question of dealing in unrelated lines, do not constitute a material change in the law since 1920. Furthermore, the Act does not apply to unrelated lines. The Act confers no jurisdiction, and the Secretary has never attempted to exercise any jurisdiction, over packer use of refrigerator cars or over business done by packers in unrelated lines. (R. 414.)

At present there is wide-spread dissemination of news relating to prices and supply of livestock and prices of fresh meats. This market information, which does not cover unrelated lines, is very remotely, if at all, related to the question of whether defendants should be permitted to deal in these lines. While the dissemination of this news may make it more difficult for the defendants to engage in unfair practices in the purchase of livestock and to manipulate the price of livestock products, it was not because of these practices that dealing in unrelated lines was enjoined. There is again inconsistency, we submit, in the holding by the court that the change in conditions as to market information does not justify removing the injunction against ownership of stockyards, but that this change is one of the factors warranting a removal of the prohibition against dealing in unrelated lines. (R. 1056, 1058.)

5. The Alleged Good Conduct of Defendants since 1920 and their Alleged Lack of Present Intent to Monopolize or Restrain Trade are not Grounds for Modifying the Decree; moreover, no convincing

Inference of Defendants' Future Good Conduct can be drawn from the Evidence.

When the Government's bill was filed in 1920 and when the consent decree was entered the defendants were subject to an injunction which prohibited them from violating the Sherman Act by combining or conspiring together "to monopolize or attempt to monopolize any part of the trade and commerce in fresh meats among the several States." *Swift & Company* v. *United States,* 196 U. S. 375, 393, *supra.* The theory of the consent decree, which can not now be collaterally attacked (*Swift & Company* v. *United States,* 276 U. S. 311, *supra*), was that a mere general injunction against monopoly and restraint of trade would not afford adequate relief, but that the defendants should be stripped of the power to monopolize or restrain trade. To that end they were required to divest themselves of the instrumentalities which, it was alleged, were used in effecting their unlawful agreements and restraints. To that end, also, they were prohibited from dealing in unrelated lines and using their route cars and branch houses in handling these lines. The decree also enjoined them from monopolizing, attempting to monopolize, or combining to monopolize interstate commerce and from engaging in agreements in retraint of trade. (R. 154, 162.)

It is not a ground for modification that the decree has been successful, and that, as stipulated in this case, "the individuals, firms, and corporations en-

gaged in the meat packing business in the United States, * * * are in active competition with each other in the purchase of livestock and in the sales of their products." (R. 558.) If no monopoly in the meat business exists to-day and if unlawful practices have been discontinued, the presumption is that this is due to the restraints imposed by the decree.

We submit that the effectiveness of the decree can not be urged as a ground for gradually whittling it away. We also submit that modification of the decree can not rest upon such an uncertain ground as speculation concerning the future good conduct of the defendants. The situation here is unlike that presented in *United States* v. *United States Steel Corp.*, 251 U. S. 417, 445, where the monopolistic practices were abandoned before suit was brought, not in contemplation of suit, but from "a conviction of their futility." The burden there was upon the Government to show the "dangerous probability" of their resumption; to place such a burden upon the Government in this case would be to treat this as an original suit.

The court below said that "the burden is clearly upon the defendants to show clearly that there have been such changes in conditions as to warrant a modification." (R. 1052.) But the weight which the court below gave (R. 1051–1052) to the failure of the Government to prove any existing monopoly or more than sporadic instances of unfair practices

amounts to requiring the Government to establish a case of contempt in order to prevent modification of the decree. And the court failed to note that during a time that appellees have been endeavoring to have the decree set aside or modified (*supra*, pp. 10–11) they might be expected to keep within the decree, a circumstance which largely destroys any inference which might otherwise be drawn from their good conduct. On the other hand, that unfair practices have occurred notwithstanding the decree indicates the danger of removing the restraints imposed by the decree.

There was evidence that on several occasions representatives of defendants had entered into agreements in restraint of trade,[11] notwithstanding the fact that officials in the main offices of the defendants had forbidden any price-fixing agreements. (R. 806.) Defendants' representatives made "threats of cutting prices" to a competitor in Texas. (R. 805.) "Wilson, Armour, and Swift were working under an agreement in Oklahoma as to minimum prices to be obtained on fresh pork." (R. 805.) In certain territories salesmen of the same defendants, together with other packers, "received weekly confidential lists of identical minimum prices." (R. 805.) That the prices ac-

[11] The parties agreed to a summarized statement of the testimony (substantially in the language of the court's opinion) dealing with unfair practices and the record does not contain the testimony theron of the individual witnesses. (R. 803–806.)

tually charged did not coincide is not important, since the prices agreed upon were minimum prices. Armour induced the Vernon Meat Company of Vernon, Texas, to join with them and others "for the observance of minimum prices to their retail customers, the prices being furnished unsigned in a plain envelope, marked 'strictly private'." (R. 805–806.) For a short time Swift's head buyer in New York entered into an agreement with a competitor allocating customers. (R. 805.) There was no evidence that officials in the main offices of defendants knew of these practices. (R. 806.)

The lower court, in holding that it would be unwise to modify the decree to permit defendants to own stockyards and stockyard terminal railroads, did not seem to be convinced that defendants would not again engage in unfair practices. It said (R. 1056):

> There are many opportunities for secret preferences in the operation of the stockyards and of the terminals, and much for propaganda and distortion of news in newspapers.

In 1929 Armour and Swift endeavored to put into effect a new method of paying sellers of milk for butterfat, and in order to force this upon their competitors, advanced the price of butterfat while the price of butter was not affected. (R. 806.) The fact that they failed in their attempt would not seem to be as important as the fact that they

were willing to attempt to force their plan upon the industry. The president of Armour plainly intimated that the power to retail, if granted by the court, might be used as a club with which to bring to terms an important customer. Referring to the possibility of a dispute with a large customer engaged in retailing and notice from the customer's buyer that he "would not buy any more products from this great house of Armour & Company," he said (R. 635–636):

> I could not conceive of that ever happening if that big buyer thought that there was an opportunity, because he or his people refused us his business, for us to go into the retail business. I can not conceive that he would reach that conclusion. I think he would find a way to do business with us.

That appellees, if permitted to manufacture and sell unrelated lines, may make an oppressive use of their control of one line of business to promote another is at least suggested by the use made by officials of appellees of the great amount of freight traffic which they control, to promote the sale of railroad equipment manufactured by companies in which these and other officials are interested. The Mechanical Manufacturing Company and the Waugh Equipment Company, manufacturers of railroad equipment, are not subsidiaries of either of appellees; but the President of Armour and his family and the President and three vice Presidents

of Swift are interested in the Waugh Company. (R. 637, 645, 649.) Members of the Swift family also owned stock in the Mechanical Company until it was dissolved several months before the trial below. (R. 649.)

At the time of the trial two proceedings were pending before the Federal Trade Commission, one involving use by Swift officials of Swift freight traffic to induce sales to railroads of equipment manufactured by the Mechanical Company, the other involving the use by Armour officials of Armour freight traffic to promote sales of Waugh equipment. (R. 801–802.) Since the trial the Federal Trade Commission has filed its findings and a cease and desist order in the Waugh case. *In the Matter of Waugh Equipment Co.*, 15 F. T. C. Decs. 232. The Commission found that 5,000 out of 7,000 shares of common stock issued when the company was reorganized in 1924 were issued as promotion stock without money consideration, and that 1,666 of these shares were given to high officials of Armour in consideration for their agreement or understanding to promote the sale of railroad equipment manufactured by the Waugh Company through their control over Armour traffic. This agreement was known to the president of Armour, but not to other officers or stockholders. Subsequently these officials increased their stock holdings and the president of Armour, through an investment trust created and controlled by him, purchased 1,000 shares of the company's common

stock. The Commission found that the Armour officials induced and compelled railroads to purchase the company's equipment in preference to competitive equipment of equal or higher quality, making use of assurances of freight traffic and threats of withdrawal, and the actual withdrawal, of traffic. The principal article manufactured by the company is draft gears. The Commission found that of total sales of draft gears for new freight equipment the Waugh Company's share was less than 1% in 1924, was 25% in 1929, and 35% in 1930.

The Commission also found that on or about December 1, 1929, the Waugh Company issued 1,666 additional shares of common stock to the trustee for the estate of G. F. Swift, a large stockholder of Swift & Company, in exchange for a license to manufacture under a device owned by the Mechanical Manufacturing Company, and that since that date the Armour and Swift interests have owned 5,415 shares out of 8,666 shares of the Waugh Company's outstanding common stock.

No decision by the Federal Trade Commission in the complaint involving the Mechanical Company has been published, but the record in this case contains ample evidence of a similar use of Swift traffic to promote the business of that company. Government Exhibit 94 (not printed) consists of over 75 separate communications between Swift officials and railroad officials or interoffice memoranda of railroads. Three typical examples of

these are set forth in the Appendix. (*Infra*, pp. 73–75.) Although the Mechanical Company is not a Swift subsidiary, letters on behalf of the former company were written on Swift & Company's stationery and were signed with that company's name. (*Infra*, pp. 73–74.)

It is significant that the decree enjoins defendants from dealing in, or owning stock in any corporation which is in the business of dealing in, "bumping posts for railroads." (R. 155, 158.) The Federal Trade Commission in its Report on the Meat-Packing Industry charged that Swift had used its traffic influence to induce railroads to buy bumping posts manufactured by the Mechanical Company. (Report of Federal Trade Commission on Private Car Lines, 1919, p. 191.)

At the time of the trial a general investigation into these "reciprocal-buying arrangements" was being conducted under the direction of the Interstate Commerce Commission. (R. 802.) For this reason the Government took no position as to the legality of such arrangements (R. 800), and the lower court is in error in stating (R. 1057) that the Government admitted that such a practice was "not illegal." The evidence was introduced as illustrative of appellees' power to attain a favored position in a business having no connection with the packing industry, not because of intrinsic merit, but because of the power given them by their vast size and many-sided activities.

CONCLUSION

It is respectfully submitted that the order of the Supreme Court of the District of Columbia should be reversed with directions to dismiss appellees' petitions for modification.

THOMAS D. THACHER,
Solicitor General.
JOHN LORD O'BRIAN,
The Assistant to the Attorney General.
CHARLES H. WESTON,
HAMMOND E. CHAFFETZ,
Special Assistants to the Attorney General.

FEBRUARY, 1932.

APPENDIX

Exhibit A (Gov. Ex. 94, Nos. 9, 44, 70)

SWIFT & COMPANY UNION STOCK YARDS

Chicago, Ill., June 23, 1928.

File A–15704 JUNE 23, 1928.

Mr. J. H. McCABE,

A. F. T. M., A. T. & S. F. R. R.,

Railway Exchange, Chicago.

DEAR SIR: In the early part of May I talked with you about the bumping post business for the Mechanical Manufacturing Company, in which the Swift family, and the writer, are interested. At that time you agreed to take the matter up with the Operating Department and post us.

I enclose a catalog showing these bumping posts, which most of the principal railroads of the country are using as their standard, and I should like very much to have you, in view of the large volume of competitive traffic that we are favoring you with, take whatever action is necessary to see that we secure your bumping post business for the future.

Please reply.

Yours respectfully,

SWIFT & COMPANY.

Per R. O. H.

SWIFT & COMPANY UNION STOCK YARDS

Chicago, December 27, 1928.

Mr. W. G. BIERD,

Receiver, Chicago & Alton R. R. Co.,

340 West Harrison St., Chicago.

DEAR Mr. BIERD: Our people (through the Mechanical Manufacturing Company, a corporation owned by the Swift family) are asking our railroad friends to consider the use of the draft gears and centering devices known as the Durable. We are expecting our railroad friends to use this gear to the extent of 25 to 33⅓ per cent on any renewals or new equipment built for their account.

We shall appreciate receiving an order from you at an early date.

Yours respectfully,

SWIFT & COMPANY.

Per R. O. H.

CHICAGO, *February 2nd, 1929.*

Mr. CAMERON: Referring to attached papers in regard to request of traffic manager O'Hara of Swift and Company in regard to their requesting us to use some of the Mechanical Mfg. Company's "durable compound draft gears" on some of the new freight car equipment for which we are now in the market:

Mr. O'Hara telephoned me Thursday last, the 31st, inquiring as to whether we intended to equip some of our new cars with their draft gear. He stated that he was about to revise their routing-chart on shipments from Chicago, Milwaukee, Sioux City, and other of their packing points to

the Southeast, and clearly indicated that if we went along with him we would get a good share of this business, but that if we did not we would lose some of it. Stated the Mechanical Mfg. Co. is owned by the Swifts, and he expected to trade the Swift Packing Co.'s traffic for some of our draft-gear business.

It is rather unusual for Mr. O'Hara to talk in this blunt way, and am satisfied, since he has seen fit to put it up to us in this direct manner, that we will lose some of the traffic which we have been receiving from Swift & Co. if we do not buy some of their draft gears.

They claim their gear is equal to that we are now using, and of course an unprejudiced test will demonstrate whether this is a fact or not.

Understand we are going to apply the Forsyth draft gear on 50 of our new freight cars to try that type of gear out. The Forsyth gear is also a reciprocity proposition.

Would strongly recommend that our Operating people meet with Mr. O'Hara and the proper officers of the Mechanical Mfg. Co. with view of coming to a satisfactory understanding if practicable to do so.

Mr. O'Hara asked that we let him know soon what our position will be.

W. HAYWOOD.

ic wh

EXHIBIT B (PET. EX. 118)

ARMOUR AND COMPANY

(*An Illinois Corporation*)

Domestic subsidiary and affiliated companies

	Per cent of voting stock owned or controlled
Armour and Company of Delaware	100
Armour and Company (New Jersey)	100
Armour and Company (Maine)	100
Armour and Company (Kentucky	100
Armour and Company, Ltd. (Louisiana)	100
Armour Creameries, Inc., Meridian, Miss	100
Armour Fertilizer Works, Chicago, Ill	100
Armour American Corporation, Chicago, Ill	100
Armour of Brazil Corporation, Chicago, Ill	100
Anglo-American Provision, Chicago, Ill	100
Atlantic Hotel Supply, New York City	100
Alexander Bros., Inc., Chicago, Ill	100
C. E. Blodgett Cheese, Butter & Egg Co., Marshfield, Wis	100
Badger State Tanning Co., Wisconsin	100
Cappan and Bertsch Leather Company, Chicago, Ill	100
Charlotte Leather Belting Co., Chicago, Ill	100
Charles L. Ireson Co., Gorham, Me	100
Chamberlain and Company, Inc., Boston, Mass	99.78
Detroit Beef Company, Detroit, Mich	100
Julius Dahlman, Inc., Brooklyn, N. Y	40
Duluth Creamery Produce Co., Duluth, Minn	50
East St. Louis Cotton Oil Co., East St. Louis, Ill	100
Friedman Manufacturing Co., Chicago, Ill	100
Fowler Packing Company, Kansas City, Kans	100
Fort Worth Poultry and Egg Co., Fort Worth, Tex	50
Fort Worth Rendering Company, Ft. Worth, Tex	50
Hammond Packing Company, St. Joseph, Mo	100
Hemphill Packing Company, Chicago, Ill	100
Iowa Rendering Company (Iowa corporation)	24.80
Lindner Packing and Provision Co., Denver, Colo	50
Lookout Oil and Refining Company, Chattanooga, Tenn	100
Luxor, Limited, Chicago, Ill	100

Meyer and Bush Company, Newark, N. J	40.29
Middletown Beef and Provision Company, Middletown, Conn	66.66
J. K. Mosser Leather Corporation, Chicago, Ill	93.78
J. K. Mosser Company (Penn.)	100
Nathan Schweitzer Company, Inc., New York, N. Y	51
National Fruit Canning Company, Seattle, Wash	87.5
New York Butcher's Dressed Meat Co., New York City	100
North American Provision Company (Illinois)	71.33
North American Provision Company (Delaware)	100
Parsons Tanning Company (Chicago)	100
Pittsburgh Provision and Packing Company, Pittsburgh, Pa	100
Price Produce Company, Bristol, Va	51
Smith Wright Company, Boston, Mass	100
Tennessee Chemical Company, Nashville, Tenn	100
Turner Creamery Company, South Dakota	100
Union Rendering Company (Denver, Colo.)	50
T. H. Wheeler Company, Boston, Mass	100
Western Casualty Company, Chicago, Ill	100
J. M. Wilson Company, Dover, N. H	75
Winslow Bros. & Smith Co. (Boston)	69.41

EXHIBIT C (PET. EX. 150)

LIST OF CORPORATIONS IN WHICH SWIFT & COMPANY OR ITS SUBSIDIARIES OWN STOCK [1]

Armstrong Packing Co., Dallas, Tex.
Associated Meat Co., Los Angeles, Calif.
Bimbler Company, Newark, N. J.
Boyd, Lunbam & Company, Chicago, Ill.
Brooks Balogna Co., Lebanon, Pa.
Canfield Commission Co., Newark, N. J.
J. F. Comstock & Sons Co., Providence, R. I.
Consumers Cotton Oil Mills, Fort Worth and other Texas points.
Corkran Hill & Co., Baltimore, Md.
H. C. Derby Co., New York and Philadelphia.
Detroit Food Purveyors, Inc., Detroit, Mich.
Engel Supply Co., New York, N. Y.
Evansville Packing Co., Evansville, Ind.
East Side Beef Corporation, New York, N. Y.

[1] The corporations in this list are 100% owned by Swift. (R. 642.)

Eckerson Co., Jersey City, N. J.
Forth Worth Packing Co., Fort Worth, Tex.
Farmers & Merchants Creamery Co., Denver, Colo.
Georgia Food Products Co., Moultrie, Ga.
Hammond Beef Co., Ann Arbor, Mich.
G. H. Hammond Co., Chicago, Ill.
H. L. Handy Co., Springfield, Mass.
J. J. Harrington Co., New York, N. Y.
Holland Butterine Co., Jersey City, N. J.
Geo. F. Hinricks, Inc., New York, N. Y.
Illinois Cold Storage Co., Chicago, Ill.
Independent Packing Co., Chicago, Ill.
Iowa Packing Co., Des Moines, Iowa.
Interstate Packing Co., Winona, Minn.
W. V. Joyner & Co., Smithfield, W. Va.
Metropolitan Hotel Supply Co., New York, N. Y.
Geo. Nye Company, Springfield, Mass.
Newton Packing Co., Detroit, Mich.
New York Veal & Mutton Co., New York, N. Y.
Northern Reduction Co., Milwaukee, Wis.
Omaha Packing Co., Chicago, Ill.
Plankinton Packing Co., Milwaukee, Wis.
E. K. Pond Co., Chicago, Ill.
St. Louis Hotel Supply Co., St. Louis, Mo.
Sturtevant & Haley Beef & Supply Co., Boston, Mass.

LIST OF CORPORATIONS IN WHICH SWIFT & COMPANY, ITS SUBSIDIARIES OR ITS OFFICERS OWN 10 PER CENT OR MORE OF COMMON STOCK [2]

Swift Refrigerator Transportation Co., Chicago, Ill.
Swift & Company Soap Works, Somerville, Mass.
Swift Wool Co., Boston, Mass.
Union Rendering Co., St. Paul, Minn.
United Dressed Beef Co., New York, N. Y.
Van Wagenen & Schickhaus Co., Newark, N. J.
Wallabout Market Packing Co., New York, N. Y.

[2] The first 7 corporations in this list are 100% owned by Swift and of the remaining corporations Swift's interest was 50% or more except in two cases. (R. 642.)

Andrews, Swift & Co. (partnership), New Britain, Conn.
F. & C. Crittenden Co., Rochester, N. Y.
Pauly & Pauly Cheese Co., Manitowac, Wis.
Swift & Company, Inc., Woonsocket, R. I.
Libby, McNeill & Libby, Chicago, Ill.
Fort Worth Rendering Co., Ft. Worth, Texas.
Independent Salt Co., Kanopolis, Kans.
Midland Warehouse & Transfer Co., Chicago, Ill.
Swift Coats Co., Greenfield, Mass.
Union Rendering Co., Denver, Colo.
Union Rendering & Refining Co., So. Omaha, Nebr.

EXHIBIT D

DIVERSITY OF SWIFT'S PRODUCTS AS DISCLOSED BY ITS YEAR BOOKS, 1921 TO 1930, INCLUSIVE (GOV. EX. 101, NOT PRINTED)

The edible products manufactured and sold by Swift include, in addition to every variety of fresh meats, cured meats, sausage, butter, eggs, cheese, poultry, lard, vegetable shortening, various kinds of oleomargarine, nut margarine, gelatine, and salad dressing. The Year Books do not state the volume of Swift's business in these various products, but Swift claimed to be one of the largest butter distributors in the country. (1927 Yr. Bk., p. 34.) Although Swift had been making gelatine, which is used in 90% of the ice cream manufactured, for only eight years, in 1929 it claimed to be one of the leading gelatine manufacturers. (1929 Yr. Bk., pp. 46–47.)

The inedible by-products manufactured and sold by Swift are still more numerous. Swift claims to be one of the largest distributors of high grade fertilizers. (1930 Yr. Bk., p. 43.) It owns three glue factories, manufacturing all grades of glue,

and claims to be producing 10% of all the glue manufactured in the United States. (*Ibid,* p. 49.) It manufactures and sells nearly a dozen varieties of soaps and cleansers, oleo oils, greases, tankage, and glycerine for automobile radiators. (*Ibid,* p. 51; 1922 Yr. Bk., p. 43.) Its packinghouse products are sold for the manufacture of a variety of pharmaceutical supplies (1930 Yr. Bk., p. 39; 1929 Yr. Bk., pp. 48–49; 1923 Yr. Bk., pp. 26–27).

In the manufacture of cottonseed oil the by-products include cottonseed cake, meal, and hulls, which are valuable feeds for livestock, and cotton linters, used for mattresses, upholstery, fibre silk, and many kinds of cotton textiles. (1929 Yr. Bk., p. 44.) Other animal and poultry feeds are manufactured from meat residues. (1923 Yr. Bk., p. 24.) The wool which it sells Swift divides into 72 classifications. (1926 Yr. Bk., p. 37.)

Swift's 1929 Year Book (p. 56) shows the following producing units and sales outlets:

Producing Units

Packing Plants	38
Produce Plants	70
Fertilizer Plants	17
Cotton Oil Mills	7
Refineries (shortening)	21
Soap Factories	3

Sales Outlets

Branch Houses, more than	400
Car Routes, more than	600
Foreign Sales Agencies, more than	100

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